BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIA DEL ROCIO RAYO	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,024,137
CARGILL MEAT SOLUTIONS CORPORATIONS	)	
Self-Insured Respondent	)	

ORDER

Claimant appeals the October 22, 2008, Award of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was awarded a 10 percent permanent partial disability to the whole body for injuries suffered on November 26, 2004, to her low back. This was based upon the impairment of function rating. Claimant was denied a permanent partial general disability (work disability) under K.S.A. 44-510e after the ALJ determined that claimant had been justifiably terminated from her employment.

Claimant appeared by her attorney, Chris A. Clements of Wichita, Kansas. Respondent appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. Respondent requests that if this matter is deemed appropriate for a work disability in excess of claimant's functional impairment, the matter be remanded to the ALJ for a determination of the appropriate percentage of work disability. The Board heard oral argument on January 16, 2009.

ISSUE

What is the nature and extent of claimant's disability? Claimant contends entitlement to a work disability after being terminated by respondent from her light-duty job. Respondent contends that claimant did not put forth a good faith effort to retain her job with respondent and, after her termination, did not put forth a good faith effort to find new employment, both of which respondent argues should result in claimant's award being limited to a functional impairment. The amount of that functional impairment is also before the Board.

FINDINGS OF FACT

Claimant suffered an accidental injury to her low back with an agreed date of accident on November 26, 2004. (A companion case with an injury date of February 10, 2005, and an injury alleged to claimant's right upper extremity and neck is being litigated under Docket No. 1,026,546.) Claimant was initially treated by board certified pain management specialist J. Raymundo Villanueva, M.D., inside respondent's plant. Claimant was diagnosed with lumbar pain, which Dr. Villanueva later described as lumbalgia. She was returned to work with a 30-pound occasional restriction, a 20-pound frequent and a 10-pound constant restriction for pushing, pulling, lifting and carrying. Claimant was to do no repetitive flexion, extension or stooping, and rotation of the trunk was prohibited. No lifting from the floor was allowed, and all carrying was to be done at waist level. A CT scan of the lumbar spine displayed a small bulge centrally, at the L4-5 and L5-S1 levels. There were osteophytic changes at the L3-4 level, but the remainder of the CT scan was normal from L2 through S1. EMG studies indicated right L5 radiculopathy. Claimant continued on the same restrictions as initially recommended. Her pain gradually decreased with restrictions and pain medication. Dr. Villanueva discussed surgery as a possibility, but did not feel anything else could be done. Additionally, claimant expressed a fear of any type of surgery. As of the final visit on June 9, 2005, claimant was rated at 7 percent to the whole body for her lumbar injury. The rating was pursuant to the fourth edition of the AMA *Guides*.[1] The earlier restrictions remained as permanent.

Respondent's return-to-work policy requires, when a person is issued restrictions, that a plant tour be conducted in order to determine which job or jobs a person can perform within his or her restrictions. Claimant initially went on a plant tour on October 27, 2003, after being returned to work from injuries suffered to her right upper extremity and neck, with an agreed injury date of April 9, 2003. During this tour, claimant was accompanied both by Tom Oldfather (respondent's workers compensation manager) and a union representative. That initial injury claim, which was assigned to Docket No. 1,015,107, was settled by an Agreed Award on August 18, 2004, and claimant returned to her regular job. A similar tour was conducted on April 12, 2005, after claimant was given restrictions from her more recent injury. Again, claimant was accompanied by Mr. Oldfather and a union representative. Mr. Oldfather identified four jobs which fell within claimant's restrictions. One of those jobs, known as defect picker, was assigned to claimant. Claimant then had two weeks to qualify on that job.

At some point, a supervisor pulled claimant from the defect picker job and moved her to the laundry room, a job not on the approved list. As this job violated claimant's restrictions, claimant was taken from the laundry room and assigned to a job called naval picker. This job, like the defect picker job, was on the trim belt and required that

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

claimant pick up minimum amounts of meat. Claimant was again given two weeks to qualify on this job. However, sometime during this two-week period, claimant missed seven days of work due to having her tonsils taken out. When claimant returned to work, she was given a new two-week period to qualify on the naval picker job. After one week, claimant was given a job review, which indicated that she was allowing too much defective product to go by. Claimant was cautioned that she needed to improve on the quality and quantity of her work. Claimant stated that she was doing the best job she could. However, performing these jobs was causing claimant to experience additional pain.

After the second week, claimant was informed that she had failed to qualify on the job and would be placed on a medical leave of absence. Claimant's last day with respondent was August 29, 2005, with her medical leave initially set to begin August 30, 2005. However, claimant used two weeks of vacation, and the medical leave did not officially begin until September 19, 2005. While on medical leave, claimant regularly contacted respondent about a possible job, as she was instructed to do. Claimant filed for and received unemployment compensation, although the exact dates of claimant's unemployment compensation payments are not known. While on unemployment, claimant did apply for at least two jobs per week, the minimum required to maintain her unemployment benefits. When claimant's unemployment benefits ran out, she stopped searching for jobs. During this time, claimant was on light duty and, while on the leave of absence, she would have been entitled to file a grievance through the union. She did not.

Respondent's medical leave policy requires that, after 18 months on medical leave, an employee is terminated. Therefore, on March 22, 2007, claimant was terminated from her employment with respondent. Claimant has not worked since being placed on the medical leave of absence by respondent. At no time did claimant file a grievance regarding the accommodated jobs or the manner in which she was placed in those jobs.

Family practice and occupational medicine specialist Terry R. Hunsberger, D.O., was provided a copy of claimant's restrictions from both Dr. Murati and Dr. Villanueva. Dr. Hunsberger agreed that the restrictions were appropriate. He also toured respondent's plant and viewed the jobs to which claimant had been assigned. Dr. Hunsberger determined that both the defect picker and naval picker jobs were within the restrictions of the doctors.

Claimant was referred by her attorney to board certified orthopedic surgeon C. Reiff Brown, M.D., for an examination on December 7, 2005. After reviewing the March 1, 2005, CT scan of claimant's lumbar spine, Dr. Brown diagnosed claimant with a central protrusion at L4-5 with indention on the dura. Mild degenerative facet arthrosis was present at L3-4 and L4-5. The L5 radicular distribution was found to have been caused by the November 2004 accident. Dr. Brown found the restrictions placed on claimant by Dr. Villanueva to be appropriate and recommended that claimant continue with same. Dr. Brown also rated claimant at 10 percent to the whole body, finding claimant to be in DRE

Lumbosacral Category III, pursuant to the fourth edition of the AMA *Guides*.[2] Dr. Brown was provided a vocational assessment report, with task performance capacity assessment sheets attached, from vocational expert Jerry Hardin. After reviewing the tasks on the assessment sheets, Dr. Brown determined that claimant was unable to perform 17 of the 22 non-duplicative tasks on the list, for a 77 percent task loss.

Claimant was referred by her attorney to board certified rehabilitation and physical medicine specialist Pedro A. Murati, M.D., for an evaluation on April 3, 2007. Claimant displayed low back pain radiating into the right leg, with numbness and tingling into the right thigh. Claimant showed decreased sensation along the right L5-S1 dermatomes with the pinprick examination. Dr. Murati also placed claimant in DRE Category III, for a 10 percent whole person impairment, pursuant to the fourth edition of the AMA *Guides*.[3] Dr. Murati opined that claimant's injuries were the result of her work-related accident with respondent on November 26, 2004. Dr. Murati was provided the same vocational assessment from Jerry Hardin as was provided to Dr. Brown. Dr. Murati also found claimant unable to perform 17 of the 22 non-duplicative tasks on the list for a 77 percent task loss.

The ALJ, in the Award, determined that claimant failed to prove that her attempts to retain her employment with respondent or to obtain employment after her termination were done in good faith. The termination was found to be justified. As such, the ALJ limited claimant's award to her functional impairment of 10 percent with no entitlement to a work disability.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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[2] AMA *Guides* (4th ed.).

[3] AMA *Guides* (4th ed.).

[4] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

It is not disputed that claimant suffered an accidental injury which arose out of and in the course of her employment with respondent on November 26, 2004. The dispute centers around claimant's efforts to retain her employment with respondent and the efforts put forth by claimant to obtain another job after her job with respondent was terminated. Claimant did not challenge the procedure utilized by respondent in touring the plant and determining jobs claimant could perform within her restrictions. Claimant did allege that the second picking job was not one which she chose during the plant tour. But, Mr. Oldfather disputed that claim, testifying that both the defect picker and the naval picker jobs were viewed and accepted by claimant. Additionally, claimant was accompanied by a union representative during each plant tour, and she did not file a grievance or register a complaint with the union regarding either of the picking jobs to which she was assigned. Finally, Dr. Hunsberger had the opportunity to review the restrictions assigned to claimant by Dr. Murati and Dr. Villanueva and to tour the plant and observe the jobs assigned to claimant. He found the jobs to be within the restrictions assigned to claimant. The Board finds no bad faith on the part of respondent in this scenario.

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[7]

The ALJ found claimant suffered a 10 percent whole body functional impairment as the result of this injury to her low back. In considering the functional ratings of the three doctors who examined claimant, the Board agrees. Both Dr. Brown and Dr. Murati determined that claimant should be placed in DRE Category III from the fourth edition of the AMA *Guides*.[8] While Dr. Villanueva found only a 7 percent impairment, the Board is persuaded by the opinions of Dr. Brown and Dr. Murati and awards claimant the 10 percent whole body disability to her low back.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

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[6] K.S.A. 44-501(a).

[7] K.S.A. 44-510e(a).

[8] AMA *Guides* (4th ed.).

> earning at the time of the injury and the average weekly wage the worker is earning after the injury.[9]
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> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[10]

Here, claimant returned to work with respondent at an accommodated position, which paid a comparable wage. During the time she was so accommodated, she would be limited to her functional impairment of 10 percent to the whole body. However, claimant was unable to certify on the jobs to which she was assigned. Therefore, it must be determined if her inability to certify constitutes a lack of good faith on claimant's part.

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[11] and *Copeland.*[12] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[13]

Claimant was initially assigned to the defect picker job and given two weeks to qualify. However, claimant testified that she only worked that job for five days when she was pulled from that job and moved to another, which claimant stated she did not select

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[9] K.S.A. 44-510e.

[10] K.S.A. 44-510e.

[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[13] *Id.* at 320.

on the tour.[14] This appears to have been the naval picker job, which Mr. Oldfather stated claimant did choose on the tour. Claimant was then pulled from this job and placed in the laundry room, a job which respondent admits did not fall within claimant's restrictions. Claimant was then moved, again, to the naval picker job and given two weeks to certify. Claimant stated that this job caused her pain in her low back and right upper extremity. Claimant advised her supervisor of this fact, but when she tried to go to the company nurse, she was told to do so on her own time. After trying on more than one occasion to certify, claimant was placed on a leave of absence and, even though she called in to respondent regularly, claimant was never able to return to work for respondent. She was terminated after being on medical leave for 18 months.

The Board sees claimant's efforts to retain her employment to be genuine. Claimant's attempts to certify did not appear to be a sham or display a lack of effort. As such, the Board finds that claimant did put forth a good faith effort to retain her job with respondent. Additionally, after being placed on medical leave, claimant contacted respondent weekly to inquire about available work. This effort on claimant's part satisfies the requirements of K.S.A. 44-510e.

When claimant was placed on medical leave, she applied for and received unemployment compensation. During this time, she applied for a minimum of two jobs per week. This effort on claimant's part also displays a good faith effort to obtain work while on medical leave. Unfortunately, this record fails to identify the specific weeks when claimant was receiving unemployment compensation.

After claimant ceased receiving unemployment compensation, she no longer looked for work. This total lack of effort on claimant's part does not constitute a good faith effort to obtain employment. Thus, the factfinder must determine a wage to impute during this period. However, the ALJ failed to calculate a wage under K.S.A. 44-510e. The Board can only determine issues which have been determined by an ALJ.[15] Additionally, the record fails to identify the weeks when claimant was receiving unemployment compensation. This prevents the Board from calculating when a wage should be utilized to determine the wage loss suffered by claimant. Therefore, it is not possible for the Board to determine, as mandated by K.S.A. 44-510e, the appropriate wage loss periods or the amount of wage loss suffered during those periods. This matter will be remanded to the ALJ for a determination of the periods when claimant received unemployment compensation and claimant's post-accident ability to earn a wage.

While the ALJ discussed the task loss opinions of Dr. Brown and Dr. Murati, she made no determination as to the percentage of task loss suffered by claimant. Again, the

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[14] Claimant's Depo. at 9-10.

[15] K.S.A. 44-555c(a).

Board does not make these determinations initially. It is the Board's responsibility to review and determine the correctness of the ALJ's findings of fact. This matter will also be remanded to the ALJ for a determination of the task loss suffered by claimant, pursuant to K.S.A. 44-510e.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to claimant's 10 percent whole body functional disability, but reversed and remanded to the ALJ with regard to claimant's wage and task loss and resulting permanent partial general disability under K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated October 22, 2008, should be, and is hereby, affirmed with regard to claimant's 10 percent permanent partial whole body functional disability, but reversed and remanded to the ALJ for a determination as to the periods of and amounts of wage loss suffered and the amount of task loss suffered, both pursuant to K.S.A. 44-510e.

IT IS SO ORDERED.

Dated this ____ day of April, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge